

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	NO. 99-4817
v.	:	
	:	
MAURICE HUDSON	:	CRIMINAL ACTION
	:	NO. 97-22-4

**MEMORANDUM ORDER**

AND NOW, TO WIT, this        day of March, 2001, presently before the court are defendant Maurice Hudson's ("Petitioner") motion to vacate, set aside or correct sentence filed pursuant to 28 U.S.C. § 2255, the government's response thereto, the Report and Recommendation of United States Magistrate Judge Diane M. Welsh, Petitioner's Objections thereto and the government's response to Petitioner's Objections. For the following reasons, the court will deny Petitioner's § 2255 motion and will approve and adopt the Report and Recommendation.<sup>1</sup>

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<sup>1</sup> The court has jurisdiction under 28 U.S.C. § 2255:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

If the court finds that such claim has merit, the court "shall vacate and set the judgment aside and shall discharge the

(continued...)

On June 30, 1997, Petitioner, represented by counsel, pled guilty to several drug-related charges, including conspiracy to distribute cocaine in violation of 21 U.S.C. § 846.<sup>2</sup> On October 16, 1997, Petitioner was sentenced to one hundred and fifty-one months in prison. The United States Court of Appeals for the Third Circuit affirmed the judgment on June 5, 1998. United States v. Hudson, 162 F.3d 1152 (3d Cir. June 5, 1998) (table). Petitioner did not petition the Supreme Court for writ of certiorari.

Petitioner's instant § 2255 motion, alleging that his trial attorney provided ineffective legal assistance in connection with Petitioner's guilty plea, was filed, at the earliest, on September 27, 1999.<sup>3</sup> It was untimely.

Section 105 of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996), amended 28 U.S.C. § 2255 to impose a one-year

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<sup>1</sup>(...continued)  
prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255. Upon receipt of objections to the magistrate report, the court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). The court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." Id.

<sup>2</sup> Petitioner also pled guilty to violations of 21 U.S.C. §§ 841(a)(1), 843(b) and 853.

<sup>3</sup> The motion Petitioner's counsel filed on September 27, 1999 was not filed on the standard form, in violation of Local Rule of Civil Procedure 9.3. Petitioner filed his motion on the requisite form on November 15, 1999.

limitation period during which a § 2255 motion must be filed. In this case, the limitation period began to run from "the date on which the judgment of conviction [became] final." 28 U.S.C. § 2255(1).

The Third Circuit affirmed Petitioner's conviction on June 5, 1998. Hudson, 162 F.3d 1152. Because Petitioner did not file a petition for writ of certiorari with the Supreme Court, his judgment of conviction became "final" under § 2255 when his time for filing a petition for writ of certiorari expired. See Kapral v. United States, 166 F.3d 565, 566 (3d Cir. 1999) (stating that "a conviction does not become 'final' under § 2255 until expiration of the time allowed for certiorari review by the Supreme Court"). Under Supreme Court Rule 13, Petitioner had 90 days from June 5, 1998, to file a petition for writ of certiorari. Sup. Ct. R. 13(1); Kapral, 166 F.3d at 570-71. Thus, his judgment of conviction became final, and the one-year period in which he could file a § 2255 motion began to run, on September 3, 1998. Accordingly, Petitioner had until September 2, 1999 to file this § 2255 motion. However, his counsel did not file the instant motion until September 27, 1999 at the earliest. Recognizing its untimeliness, the Magistrate Judge sua sponte recommended that the motion be dismissed.

In his Objections to the Magistrate Judge's Report and Recommendation, Petitioner asserts that because the one-year limitations period set forth in § 2255 is not jurisdictional, it was waived when the government did not raise it. See Def.'s

Objections to Recomm. & Rep. ¶ 1 (citing Miller v. New Jersey Dep't of Corrections, 145 F.3d 616, 617-18 (3d Cir. 1998)).

Petitioner contends that the Magistrate Judge had no authority to dismiss his untimely § 2255 motion.

Petitioner's assertion is incorrect. See Kiser v. Johnson, 163 F.3d 326, 328 (5th Cir. 1999) (holding that district court may raise limitation bar sua sponte); Hare v. Ray, 232 F.3d 901 (table), text available at 2000 WL 1335428, at \*1 (10th Cir. Sept. 15, 2000) (denying certificate of appealability following magistrate judge's sua sponte dismissal of untimely § 2254 petition). The motions, files and records of this case conclusively show that Petitioner is "entitled to no relief" under the statute. 28 U.S.C. § 2255. Under Rule 4(b) of the Rules Governing § 2255 motions:

If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified.

Petitioner relies on a statement in Giles v. United States for the proposition that the government waived the AEDPA's one-year limitation period. 6 F. Supp. 2d 648, 649 (E.D. Mich. 1998) (stating that "if the statute of limitations is not jurisdictional, the government waived the defense by not asserting it"). In Giles, however, the court concluded that the limitations period was jurisdictional; consequently, waiver did

not apply. Id. at 650.<sup>4</sup> Dicta does not control the present inquiry. See Kapral, 166 F.3d at 575 (citing Patel v. Sun Co., Inc., 141 F.3d 447, 462 & n.11 (3d Cir. 1998) (discussing meaning of "dictum" and why it should not be given any weight)).

The court finds that, before the AEDPA's enactment, 28 U.S.C. § 2255 permitted a petitioner in federal custody to file a motion attacking his sentence "at any time." In furtherance of its desire to curb the abuses of delayed and repetitive filings and to accelerate the federal habeas process, Congress imposed a one-year limitations period within which petitions may be filed. 28 U.S.C. § 2255; see Kapral, 166 F.3d at 571 (citations omitted). The court's holding comports with the policy underlying the statute: the AEDPA's purpose is best furthered by recognizing that Congress definitively limited the time in which a petitioner may seek § 2255 review.

The court also notes that a § 2255 action is simply not like a private civil action wherein a party may choose to waive a particular affirmative defense rather than raise it pursuant to Fed. R. Civ. P. 8(c). Rather, the AEDPA's time limitation implicates values, including the promotion of judicial efficiency, the conservation of judicial resources and the interests of society, that transcend the concerns of the parties.

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<sup>4</sup> In researching Petitioner's Objections, the court also reviewed a District of New Jersey case wherein the court assumed, without deciding, that the AEDPA's limitations period was subject to waiver. See Fadayiro v. United States, 30 F. Supp. 2d 772, 779 (D.N.J. 1998) (declining to equitably toll limitations period and dismissing untimely § 2255 motion).

Acosta v. Artuz, 221 F.3d 117, 123 (2d Cir. 2000) (recognizing power of district court to raise sua sponte petitioner's failure to comply with AEDPA's statute of limitations).

Petitioner also contends that his conviction was not "final" until the Court of Appeals' mandate was issued. (Def.'s Objections to Recomm. and Rep. ¶ 3.) However, as stated supra, where a defendant does not file a certiorari petition, the judgment of conviction becomes final within the meaning of § 2255 on "the date on which the defendant's time for filing a timely petition for certiorari review expires." Kapral, 166 F.3d at 570-71 & 577. Under Supreme Court Rule 13(3), "[t]he time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance of the mandate."<sup>5</sup> See also United States v. Miller, 197 F.3d 644, 652 & n.9 (3d Cir. 1999) (determining finality of judgment based on date Third Circuit affirmed direct appeal, not date mandamus issued).

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<sup>5</sup> The court notes that when Supreme Court Rule 13 is not complied with, the "Clerk will not file" the petition for a writ of certiorari. Sup. Ct. R. 13(2). "For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days." Sup. Ct. R. 13(5). However, an application to extend the time to file the petition "must be received by the Clerk at least 10 days before the date the petition is due, except in extraordinary circumstances." Id. Further, Rule 13.6 expressly states that such applications "are not favored." See also Penry v. Texas, 515 U.S. 1304, 1305-06 (1995) (finding that voluminous record, breadth of errors, and counsel's absence from office did not demonstrate good cause required for extension of time); Mississippi v. Turner, 498 U.S. 1306 (1991) (finding that absent "events unforeseen and uncontrollable by both counsel and client," good cause was not shown).

Finally, Petitioner asserts that the Magistrate Judge erred in recommending dismissal without considering whether grounds exist "to equitably toll the statute of limitations" because the docket entries reflected that judgment was entered by the Court of Appeals on June 29, 1998. (Def.'s Objections to Recomm. & Rep. ¶ 6.) Petitioner's counsel submits that he relied in good faith on the date shown on the docket when he calculated the expiration of the statute of limitations. Id.

However, the court notes that equitable tolling:

is proper only when the principles of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing the claims. Mere excusable neglect is not sufficient.

Kapral, 166 F.3d at 618 (internal quotations and citations omitted). The court finds that there is no basis to equitably toll the AEDPA's one-year limitations period in this case. See id. at 568 n.1 (rejecting counsel's argument that he "reasonably relied" on misinformation from clerk's office); Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999) (finding that lawyer's miscalculation of deadline did not warrant equitable tolling).<sup>6</sup>

For the reasons set forth above, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED;

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<sup>6</sup> Petitioner neither contends that he did not receive actual notice of the entry of the Third Circuit's June 5, 1998 judgment nor suggests that a petition for certiorari would have been timely under Supreme Court Rule 13 if, based on counsel's reliance on the docket entry, it was filed more than ninety days after June 5, 1998.

2. Petitioner's motion filed pursuant to 28 U.S.C. § 2255 is DENIED and DISMISSED without an evidentiary hearing; and
3. There is no probable cause to issue a certificate of appealability.<sup>7</sup>

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LOUIS C. BECHTLE, J.

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<sup>7</sup> The court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).